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IN THE

Supreme Court of the United States

No. 71-322

IN THE MATTER OF THE COMPLAINT OF
UNTERWESER REEDEREI, GMBH,
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE M/S BREMEN
UNTERWESER REEDEREI, GMBH,

Petitioner,

v.

ZAPATA OFF-SHORE COMPANY

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

JAMES K. NANCE of
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
and
DEWEY R. VILLAREAL, JR., of
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY & BOGGS, P.A.
P. O. Box 1438
Tampa, Florida 33601
Attorneys for Respondent,
ZAPATA OFF-SHORE COMPANY

FIDELITY PRINTING COMPANY, INC., HOUSTON

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OPINION BELOW

The panel opinion of the Court of Appeals (A. 229) is reported at 428 F.2d 888. On rehearing en banc, the Court adopted, per curiam, the majority holding and judgment of the panel. (A. 283; 446 F.2d 907). The order of the District Court (A. 224) is reported at 296 F. Supp. 733 (M.D. Fla. 1969).

JURISDICTION

The jurisdiction of the District Court was predicated upon the Constitution of the United States, Article III,

Section 2, and Title 28 U.S.C. § 1333, c. 646, 62 Stat. 931 (amended), and 46 U.S.C. § 181, et seq. c. 43, 9 Stat. 635 (amended). The jurisdiction of the Supreme Court to review the decision of the Court of Appeals is conferred by 28 U.S.C. § 1254(1), c. 646, 62 Stat. 928. The judgment of the Court of Appeals on Rehearing En Banc was entered on June 28, 1971. The Petition for Writ of Certiorari, filed September 1, 1971, was granted November 9, 1971.

Question Presented

Zapata commenced suit against Unterweser in Tampa. Unterweser disputed jurisdiction, and asked the court to decline on *forum non conveniens* grounds or stay pending submission to the English court. Unterweser then commenced suit against Zapata in London. Next Unterweser filed a suit for exoneration from or limitation of liability in Tampa and obtained in that suit an injunction staying Zapata's first filed suit. Zapata filed claim and answer in the limitation suit. Unterweser counterclaimed. Zapata replied to the counterclaim. At this point Zapata moved the limitation court to enjoin Unterweser's prosecution of the London suit and Unterweser moved the limitation court to stay the prosecution of Zapata's claim in the limitation suit. The question is:

> WHETHER, IN THE CIRCUMSTANCES OF THIS PARTICULAR CASE, THE DISTRICT COURT ABUSED ITS JUDICIAL DISCRETION IN RULING THAT ALL OF THE CONTROVERSIES AT ISSUE BETWEEN UNTERWESER AND ZAPATA SHOULD BE TRIED IN UNTERWESER'S OWN TAMPA SUIT FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

STATEMENT

Zapata, a Houston based American corporation, engaged Unterweser, a Bremen based German corporation, to tow its American flag drill rig CHAPARRAL from the Mississippi River below New Orleans to a point in the Adriatic Sea near Ravenna, Italy. The towage contract included a London forum clause.

It is Zapata's contention that its representatives instructed those in charge of the BREMEN to tow the CHAPARRAL around the coast from the Mississippi Passes to the Straits of Florida, in water no deeper than 250 feet, so that, in the event of untoward weather, the CHAPARRAL might lower its legs to the seabed, to elevate (or jack up) the body of the rig and await suitable conditions to resume the tow.[1] There is a conflict in the evidence as to whether or not Unterweser's representatives were so instructed to proceed by Zapata's representatives.

Special locking devices on board the drill rig were to be installed to immobilize the three 435 foot long legs before the trans-Atlantic crossing was begun.[2] As it happened, the BREMEN, with the CHAPARRAL in tow, set out on a

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[1] Zapata has alleged in its answer to Unterweser's limitation action that the casualty to the CHAPARRAL was caused by the negligence of Unterweser and those in charge of the BREMEN in several respects, including the following:

> "(6) Those in charge of the BREMEN failed to tow the CHAPARRAL in depths of water in which the CHAPARRAL's legs might be lowered to the ocean bottom and the CHAPARRAL might be elevated out of the water in the event of adverse weather, despite instructions from Zapata to proceed in such depths of water.
>
> (7) Those in charge of the M/S BREMEN failed to tow the CHAPARRAL in coastwise waters on the voyage from Louisiana toward the Florida Straits, despite instructions from Zapata so to proceed." (A. 108, 109).

[2] See photograph of locking devices in attached Appendix, A-2.

direct course across the Gulf of Mexico from the Mississippi to the Florida Straits instead of proceeding coastwise in jack-up water depths. When weather worsened in a norther the flotilla was in the middle of the Gulf of Mexico in about 10,000 feet of water, about 150 miles from the nearest 250 foot depth. There was no possibility of lowering the legs to the seabed and elevating the body of the rig in order to ride out the severe weather. As the sea grew rougher and the CHAPPARRAL rolled, the stress on the legs passed the breaking point. Then, as Unterwesser puts it, "the legs of the CHAPARRAL collapsed and fell into the sea." A falling leg broke the tow hawser. The riding crew left the CHAPARRAL and was picked up by the BREMEN. Later the BREMEN put a tow hawser on the CHAPARRAL and Zapata told Unterweser to tow the wrecked rig to Tampa, Florida, the nearest port of refuge.[3]

On January 12, 1968, Zapata commenced suit against Unterweser *in personam* and the tug BREMEN *in rem* alleging *negligent* towage on the part of those in charge of the BREMEN, seeking to recover $3,500,000 in damages. (A. 7).

When the flotilla arrived at Tampa, the U. S. Marshal arrested Unterweser's tug, the BREMEN, in Zapata's suit. (A.148). Zapata deposed Unterweser's managing director and the entire 23 man crew of the BREMEN (including Unterweser's riding crew on the CHAPARRAL) in Tampa on January 23-31, 1968. (A. 149).[4]

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[3] See photograph of damaged CHAPARRAL following the casualty, Appendix, A-3.

For photograph of CHAPARRAL in drilling position, with legs lowered (prior to casualty), see Appendix, A-4.

[4] In connection with these depositions the navigational charts, log books, incoming and outgoing radio messages of the BREMEN, and certificate by competent surveyor (required by paragraph 4 of towage contract), were produced.

On January 29, 1968 Unterweser, asserting the forum clause, moved for dismissal of Zapata's suit, contending the district court lacked jurisdiction. Alternatively, Unterweser moved the court (1) to decline jurisdiction on *forum non conveniens* grounds, or (2) to stay the Tampa suit, pending submission of the matter to the English courts. (A. 19).[5]

Meanwhile Unterweser commenced suit for *breach of contract* against Zapata in London on February 21, 1968 (A. 134), seeking to recover tug hire, damages to towing gear, and lost profits. *No claim for salvage was asserted.* (A. 138).

Unterweser, *after notice filed in Zapata's suit* (A. 34), deposed the CHAPARRAL's 8 man crew in Tampa on February 22-25, 1968. (A. 53,54).[6]

Further *invoking* the Tampa court's aid in the first suit, Unterweser moved for the production of 33 categories of documents on February 27, 1968. (A. 37). Zapata responded by producing 700 pages of documents for Unterweser's inspection. (A.151).

Again invoking the court's aid, on March 15, 1968 Unterweser noticed the depositions of 2 expert surveyors who had approved the CHAPARRAL for the tow to the Florida Straits. (A. 43). These depositions were taken in New Orleans April 9-12, 1968. (A. 151).[7]

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[5] The court in its Memorandum and Order of July 29, 1968 denied these motions. (A. 80). No appeal was taken by Unterweser.

[6] In the course of the depositions, the maintenance and operation manuals of the CHAPARRAL, the operating and maintenance records prepared and kept in connection with the CHAPARRAL, and the records covering the CHAPARRAL's movements prior to the voyage in question, were all produced and copied.

[7] Noel Thompson and John Hellendoorn, Salvage Association (London) marine surveyors, residents of Louisiana and New

On July 2, 1968 Unterweser filed a complaint in the U. S. District Court at Tampa seeking exoneration from or limitation of liability for events on the voyage upon which the CHAPARRAL was damaged. (A. 85).

On July 5, 1968 the district court, on Unterweser's motion, enjoined the further prosecution of Zapata's first filed suit. (A. 97).

On July 8, 1968 Zapata filed its claim in Unterweser's limitation suit. (A. 102). On July 24, 1968 Zapata filed its answer. (A. 104).

On August 28, 1968, in the limitation suit, Unterweser filed a counterclaim against Zapata for everything sought in the London breach of contract suit (A. 112), and in addition Unterweser alleged (1) in Count I a maritime tort (negligence) against Zapata for damage to the BREMEN's towing gear (A. 113), and (2) in Count II a claim for a salvage award for services rendered by the BREMEN following the casualty. (A. 115). Unterweser alleged its salvage services were *not* contemplated by the towage contract and consisted of services *outside* the contract. (A. 116). Unterweser's stated damages totalled $91,483.08, plus an unspecified amount for (1) lost profits and (2) salvage services. (A. 114-116).

On September 13, 1968 Zapata replied to Unterweser's counterclaim. (A. 116). All issues between the parties were then joined in Tampa.

On September 19, 1968 Zapata moved for an order en-

Jersey, respectively. Their survey notes and reports were produced and copied as was certain correspondence between the New Orleans and New York offices of Salvage Association, London, in connection with the CHAPARRAL casualty. (A. 151). These witnesses testified as to the voyage and routing plans of the tug and tow in conferences held with Zapata and Unterweser representatives. (A. 145).

joining Unterweser from prosecuting its London suit. (A. 118).

On October 2, 1968 Unterweser moved for an order staying the further prosecution of Zapata's claim in the limitation suit pending final determination of the London suit. (A. 205).

On January 21, 1969 the district court denied Unterweser's motion to stay and granted Zapata's motion for injunction against Unterweser's prosecution of the London suit. (A. 224). *This is the order from which Unterweser appealed.*

In the London suit (1) Zapata has not joined issue, (2) Zapata has asserted no counterclaim, (3) neither party has taken any testimony, and (4) there has been no pretrial discovery. Action in the London suit has been suspended by agreement between the parties pending the outcome of the appeal.

Zapata Off-Shore Company was self-insured with respect to all of the risks on the CHAPARRAL. (A. 321). There was neither hull and machinery insurance, protection and indemnity insurance, nor liability insurance on the CHAPARRAL. (A. 321).

Zapata has paid, with its own funds, approximately $3,000,000 for repairs to the CHAPARRAL and other expenses resulting from the casualty. Zapata has no claim pending against anyone, other than Unterweser and the BREMEN, to recover these damages. (A. 321). In addition to the moneys actually paid for repairs and related expenses, Zapata claims damages of approximately $500,000 for the loss of use of the CHAPARRAL while it was being repaired.

Zapata alone will bear the expenses of defending the claim asserted against it by Unterweser Reederei Gmbh and will

respond to any judgment rendered against it arising out of this litigation. (A. 321).

The BREMEN is enrolled with the United Kingdom Mutual Steamship Assurance Association, Limited, a Protecting and Indemnity Club. The Club is bearing the expenses of the litigation and will respond to any judgments against the BREMEN and Unterweser arising out of this litigation.[8]

The towage contract was signed by Zapata in Houston, Texas. The following duties arising under the contract were performed in the United States:

By Zapata

Preparing the CHAPARRAL for the voyage so as to have her in a "seaworthy" condition for the proposed towage. (A. 25, Par. 4). This work was done in the Mississippi River near Venice, Louisiana. (A. 154).

Engaging Salvage Association, London (a world-recognized marine surveying organization) to examine the CHAPARRAL and certify her seaworthiness for the voyage prior to departure. (A. 25, Par. 4). The Salvage Association's Messrs. Thompson (a Louisiana resident) and Hellendoorn (a New Jersey resident) conducted the examination while the CHAPARRAL was in the Mississippi near Venice. (A. 154). On January 5, 1968, Hellendoorn certified the CHAPARRAL for the voyage (limited to the Florida Straits). (A. 154).

Paying tow hire to the Chase Manhattan Bank in New York City, in favor of Unterweser. (A. 24, Par. 1).

Paying the charges of the Mississippi River pilots for piloting the BREMEN and the CHAPARRAL from Venice, Louisiana, to the Gulf of Mexico. (A. 24, Par. 2; A. 154).

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[8] Unterweser's Supplemental Brief on Rehearing En Banc in Court of Appeals, p. 4.

By Unterweser

Sending Port Captain/Marine Superintendent Otto Litwinski to the CHAPPARAL in December, 1967 to inspect the CHAPARRAL and, with Zapata's representatives, to plan the voyage. (A. 153).

Sending the master and certain other officers and crew of the BREMEN on board the CHAPARRAL for inspection and making towing arrangements and connections. (A. 154).

By towing the CHAPARRAL from Venice, Louisiana, to the point in the Gulf of Mexico at which the flotilla passed out of the territorial waters of the United States. (A. 154).

SUMMARY OF ARGUMENT

Having submitted itself and the entire dispute to the Tampa court by filing suit for limitation of liability, having Zapata's first filed suit stayed by the limitation injunction and counterclaiming against Zapata, Unterweser should not be heard to complain that the court refused to stay the limitation suit. Unterweser might have plead the limitation statutes as a defense had it not wanted the *concourse* and the *ex parte* stay of all other proceedings. To allow simultaneous litigation of the dispute would increase costs, lead to vexation and delay, and defeat the limitation law's objective of settling the whole controversy. *Hartford Accident & Indemnity Co.* v. *Southern Pac. Company,* 273 U.S. 207 (1927).

The non-exclusive forum clause in the towage contract does not purport to reach claims *in rem. The Monrosa* v. *Carbon Black Export, Inc.* 359 U.S. 180 (1959). It surely cannot be held to preclude Zapata from filing and prosecuting its claim in the limitation action Unterweser started in the Tampa court. And it is not cast in the traditional lan-

guage used to designate one forum to the *exclusion* of all others. Unterweser drafted the forum clause and must bear the brunt of any obscurity.

Enforcement of the forum clause would have been unreasonable, because it would effectively deprive Zapata of a remedy it has in the American court for damages caused by Unterweser's negligence.[8a] In the London court the exculpatory clauses, void as against United States public policy here, would be enforced.

Enforcement would also be unreasonable because it would send Zapata to a forum in which, if Unterweser be allowed to limit its liability, the limitation fund would be $80,136 as opposed to the United States fund of $1,390,000.[8b]

Enforcement would be unreasonable because the balance of convenience is strongly in favor of the Tampa court. The voyage preparations, the voyage, and the aftermath all occurred in the United States or nearby in the Gulf of Mexico. Forty witnesses live on the Gulf Coast or the lower Mississippi. The foreign crew members' testimony has been preserved by deposition.[8c] In all, 35 oral depositions have been taken in the Tampa litigation. Issue is not yet joined in London.

Whether considering the convenience of the forum or the unreasonableness of enforcement of a forum clause, the courts have looked to the same factors. The focus on these factors is at the time of the litigation, *not at the time of contract.*

Where the district court considered the burden of proof lay might be of critical importance, if the factors of convenience/unreasonableness were evenly divided. But here

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[8a] *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

[8b] *The Titanic*, 233 U.S. 718 (1914).

[8c] "Depositions are frequently taken and used, for witnesses are likely to be long gone before a suit can be reached on the docket." Gilmore & Black, *The Law of Admiralty*, § 1-12, p. 31.

the District Court found the factors preponderated strongly in favor of Tampa. Any presumption of validity of the forum clause, or burden of proof of unreasonableness, becomes unimportant when the evidence points to one result — the balance of convenience *strongly* favors the Tampa court.

The District Court properly exercised its discretion in determining that the entire controversy should be tried in Unterweser's limitation action. The Court of Appeals found there was no abuse of that discretion. And that discretion may not be disturbed unless abused. *Charter Shipping Co., Ltd.*, v. *Bowring, Jones & Tidy, Ltd.*, 281 U. S. 515 (1930).

ARGUMENT

I

Unterweser's Motion to Stay Was Properly Denied Because Unterweser Had Submitted Itself and the Entire Dispute to the District Court's Jurisdiction by Filing the Limitation Suit, Procuring the Issuance of a Limitation Injunction, and Counterclaiming Against Zapata.

Unterweser is seeking to overturn affirmance of a discretionary order entered by the district court in a limitation suit Unterweser started.

Unterweser's fundamental inconsistency in filing for limitation and having further prosecution of Zapata's first filed suit enjoined, by the limitation injunction on the one hand, and seeking then to have the limitation suit stayed on the other, should not be countenanced under the circumstances of this case.

The district court jurisdiction Unterweser invoked was predicated upon the Constitution of the United States,

Article III, Section 2;[9] Title 28 U.S.C. § 1333, c. 646, 62 Stat. 931 (amended);[10] and [the limitation of liability statute] 46 U.S.C. § 181, et seq., c. 93, 9 Stat. 635 (amended). (Petition for Certiorari, p. 5)

In its complaint for limitation Unterweser alleged that it ". . . desires to contest its liability and the liability of M/S BREMEN for the injuries, losses and damages . . . incurred upon said voyage, *and particularly any losses and damages incurred by the owners [Zapata] of the drill rig CHAPARRAL. . . .*" (A.89). (emphasis added)

Unterweser further asserted in its ad interim stipulation that ". . . the Plaintiff [Unterweser] wishes to prevent the prosecution of all proceedings against Plaintiff, or M/S BREMEN . . . in any and all courts . . . arising out of the matters . . . recited in said Complaint . . . *except in the present proceedings* . . ." (A. 95). (emphasis added)

Unterweser invoked the jurisdiction of the district court at Tampa to seek the *privilege* of limiting its liability to all who might assert claims arising on the voyage which ended at Tampa.[11] If Unterweser is allowed to limit its liability

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[9] Article III, Section 2 of the United States Constitution provides:

"Jurisdiction of Courts.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction; . . ."

[10] 28 U.S.C. § 1333 provides:

"Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . ."

[11] Gilmore and Black, *The Law of Admiralty*, § 10-7 p. 668, comments on Section 183(a) of Title 46 U.S.C. as follows:

in this case, the *privilege* will be worth $2,110,000, if there are no other claims and if interest on Zapata's claim is disregarded.[12]

Besides the privilege of seeking limitation of liability to the value of the BREMEN, Unterweser sought and obtained the *privilege* of drawing all claims arising on the voyage which ended at Tampa into *concourse* in the Tampa court. In its sworn complaint for limitation of liability Unterweser said:

> "Plaintiff [Unterweser] asserts that demands made in such action [referring to Zapata's first-filed suit] greatly exceed the value of M/S BREMEN and its pending freight, if any, or the interest of Plaintiff therein; *further, plaintiff fears the filing of additional claims.*" (A. 88). (emphasis added)

There were a number of potential claimants. The events surrounding the loss of the CHAPARRAL's legs were har-

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"Section 183(a) thus states, in terms of the utmost generality, the types of claims against which the *privilege* of limitation is conferred, conditions the *privilege* on the absence of 'privity and knowledge' on the part of the owner, and sets, as the maximum liability of an owner entitled to limit, his interest in the vessel and her pending freight. . . ." (emphasis added)

46 U.S.C. § 183(a), R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479, provides:

"The liability of the owner of any vessel, whether American or foreign . . . *for any act, matter, or thing, loss, damage,* or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, *shall not,* except in the cases provided for in subsection (b) of this section, *exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.*" (emphasis added)

[12] Zapata's total claim is $3,500,000. ($3,000,000 for repairs; $500,000 for loss of use). Unterweser seeks to limit its liability to its interest in the BREMEN, alleged to be $1,390,000. Accordingly, the privilege sought by Unterweser to limit its liability is worth $2,110,000, if there are no other claims.

rowing for those on board.[13] As Unterweser put it, "In view of the nature of the casualty involved, no one could say, least of all Unterweser, that no other claims would be filed." (Reply Brief in Court of Appeals, p. 11).

To compel the concourse, Unterweser, in its limitation suit, sought and obtained an *ex parte* injunction restraining further prosecution of Zapata's suit, No. 68-21, in which Unterweser had taken 8 oral depositions and conducted extensive discovery going to the merits, not to jurisdictional matters raised in Unterweser's motions.[14]

In its Tampa action Unterweser seeks, in addition to the privilege of limitation of liability and the benefits of a concourse of claims, affirmative recovery from Zapata for:

1. the contract damages claimed also in London;

2. a recovery in tort for negligent damages to the BREMEN's tow gear; and

3. salvage services rendered to the wrecked CHAPARRAL. Unterweser alleged its salvage services were *not* contemplated by the towage contract and consisted of services *outside* the contract. (A. 116). (Zapata feels the same way about Unterweser's towing the rig with its legs unlocked,

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[13] Following the loss, the eight Americans and three Germans on the CHAPARRAL had to leave the rig and were rescued by the BREMEN's crew. Several of Zapata's crew members received injuries while leaving the wrecked CHAPARRAL. Also, the voyage was terminated because of the casualty. These American crew members could have filed claims against Unterweser for damages and/or lost wages. Potential claims existed at the time Unterweser filed its limitation action.

This court has held repeatedly that one of the objectives of a limitation proceeding is to provide the shipowner, seeking to limit its liability, a *concourse* to try all claims that may be asserted against it. *Providence & N.Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578 (1883), 594-595; *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927), at 215;

across the deepest part of the Gulf of Mexico, in disregard of Zapata's instructions to tow the CHAPARRAL in jack-up water depths).

The Tampa District Court, in a limitation proceeding, sits as a court of equity and has before it all of the controversies between Zapata and Unterweser arising out of the casualty and the voyage in question. That it can and should do complete justice to all parties in this limitation proceeding was laid down by Chief Justice Taft in *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927), at 215-216:

> "It is quite evident from these cases that this court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, *and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of*

Spencer Kellogg Co. v. *Hicks*, 285 U.S. 502 (1932), at 512; *British Transport Commission* v. *United States*, 354 U.S. 129 (1957), at 136.

[14] The first filed suit was being litigated hammer and tongs by Zapata and Unterweser until Unterweser obtained the limitation injunction. 35 depositions (2170 pages of testimony) had been taken. Unterweser had made very good use of the district court's judicial processes in Zapata's suit. Unterweser noticed and took in Tampa, Florida, the oral depositions of the Zapata employees on the CHAPARRAL for the purpose of discovery *and for use at trial*. (A. 34-35; 150-151). Unterweser noticed and took in New Orleans oral depositions of two marine surveyors, Noel Thompson and John Hellendoorn, for purpose of discovery. (A. 43; 151). Unterweser filed on February 27, 1968 a Motion for Production of Documents. (A. 37-41). This motion was settled, and Zapata produced for Unterweser's inspection some 700 pages of documents. (R. 155). Zapata submits this conduct on the part of Unterweser constituted a waiver of its various motions addressed to the court's jurisdiction and amounted to a consent to the court's continuing exercise of jurisdiction in the first filed suit.

equity in an admiralty court. . . . It looks to a complete and just disposition of a many-cornered controversy. . . ." (emphasis added)

In *British Transport Commission* v. *United States*, 354 U.S. 129 (1957), affirming the Fourth Circuit, 230 F.2d 139 (1956), the questions were whether a limitation petitioner could cross-claim against one of the claimants and whether claimants could cross-claim amongst themselves. The Fourth Circuit felt such cross-claims were proper, holding, at 145:

> "Modern codes of procedure have reflected two facets: (1) all rights if this can fairly be done, should be decided in a single legal proceeding; (2) *parties who submit themselves to the jurisdiction of a court in a legal proceeding should be bound by that court's decision on all questions, appropriate to and seasonably raised in that proceeding.*" (emphasis added)

This Court, in affirming the Fourth Circuit, said, 354 U.S. 129, at 137:

> ". . . The question is not what 'tag' we put on the proceeding, or whether it is a 'suit' under Rule 56 or a libel in personam, or whether the pleading is of an offensive or defensive nature, *but rather whether the Court has jurisdiction of the subject matter and of the parties.* It is sufficient to say as did Chief Justice Taft for a unanimous Court in *Hartford Accident & Indemnity Co. of Hartford* v. *Southern Pacific Co.*, 1927, 273 U.S. 207, . . . *'that all the ease with which rights can be adjusted in equity is intended to be given to the [limitation] proceeding. It is the administration of equity in an admiralty court. . . . It looks to a complete and just disposition of a many-cornered controversy . . . .'*" (emphasis added)

The Salvore, 36 F.2d 712 (2d Cir. 1929), presented a litigation context much like the one arising out of the voyage

of the BREMEN and the CHAPARRAL. American plaintiffs sued and served an Italian shipowner in New York for cargo damage. The Italian shipowner sued the New York plaintiffs in Italy for wrongfully arresting one of its ships under writ of foreign attachment issued in the New York suit. Then the Italian shipowner started a suit for limitation in New York. There was no forum clause involved. In its limitation suit the shipowner obtained an injunction against further prosecution of the cargo claims in the first filed suit. Directing the district court to dissolve the limitation injunction unless the shipowner agreed to stay the suit in Italy until the determination of the New York litigation, the Second Circuit observed at 713 that: "The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, invoking the aid of the court, and the appellee [shipowner], seeking equity, should willingly do equity, if it wants the benefit of avoiding a multiplicity of suits and limiting its liability. . . . It must be willing to bring in all the controversies in the limitation proceedings, for it has invoked the court's aid."

Regarding the power of the district court to deal with the shipowner, the Second Circuit continued at 714: "The court below having obtained prior jurisdiction of the parties, and the appellee [shipowner] having sought that same jurisdiction in its limitation proceedings, unquestionably gave the court the power to deal with the appellee before it as equity and justice required." The Second Circuit went on to note that the court first obtaining jurisdiction has the authority and the power to enjoin the parties from litigating in another jurisdiction, pointing up the distinction between restraining the action of the foreign tribunal, which it could not, and restraining parties before it, which it could do.

In 1955, the Second Circuit, citing The Salvore, *supra*,

held a district judge was "clearly correct" in exercising his power in a limitation suit to compel the shipowner seeking limitation to obtain a stay of its suit in another circuit relating to the collision with respect to which limitation was sought. *A. C. Dodge, Inc. v. J. M. Carras, Inc.*, 218 F.2d 911 (2d Cir. 1955).[15]

In his dissent from the Court of Appeals Judge Wisdom agreed that if the district court properly retained jurisdiction, *it properly enjoined prosecution of the London action.* (A. 281). And Unterweser, who argued in the district court and the court of appeals that (1) the district court lacked the power to enjoin Unterweser from proceeding in London at all, and (2) the facts in this case did not justify the injunction even if jurisdiction were retained, seems to have abandoned lack-of-power argument in this Court.

To avail itself of the *privilege* the statutory law of the United States confers on domestic and foreign shipowners, Unterweser filed the limitation suit in Tampa. Unterweser was under no *legal duty* to seek this *privilege.*[16] Analysis is not much aided by Unterweser's argument that it was forced or compelled to file for limitation of liability because the district court had not ruled on its motions and the six month statute of limitations was about to run. If the district judge had entered his order of July 29, 1968 on May 29, 1968 or sooner, or later, the statutory period for suing for limitation of liability would have continued

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[15] The district judge had dissolved the limitation injunction with the proviso that it would be reinstated if the shipowner obtained a stay of its other suit within four days.

[16] "The vessel owner . . . . *may* petition a district court . . . for limitation of liability. . . . ." 46 U.S.C. § 185. (emphasis added)

(1) "any vessel owner *may* file a complaint in the appropriate district court . . . for limitation of liability pursuant to statute. . . ." Supplemental Rule F, Federal Rules of Civil Procedure. (emphasis added)

The language is obviously permissive.

to run.[17] In any case, Unterweser would have faced the need for decision whether to *sue* for limitation of liability early in July.[18]

The Tampa court, having obtained prior jurisdiction of the parties in Zapata's suit against Unterweser and the BREMEN, and Unterweser having invoked the jurisdiction of the same court in its suit for limitation, recognized that it had the power to deal with the parties as equity might require.[19]

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[17] In effect, Unterweser's option to seek limitation affirmatively, under § 185, was going to expire on July 12, 1968, six months after receipt of Zapata's first written notice of intention to claim.

[18] Unterweser could have obtained the protection of the limitation statutes as against Zapata by raising limitation as a defense to Zapata's suit. *Coryell* v. *Phipps*, 317 U.S. 406, 407-8 (1943). Defense of limitation *set up in answer* under § 183. This Court held: ". . . courts below were correct in allowing the limitation of liability under § 4283." [now § 183, 46 U.S.C.], affirming 128 F.2d 702 (5th Cir. 1942), which affirmed 39 F. Supp. 142 (S.D. Fla. 1941), where style was *Coryell* v. *Pilkington*, and in which the distinction was considered on p. 145; *Murray* v. *New York Central Railroad Co.*, 287 F.2d 152, 153 (2d Cir. 1961); *Deep Sea Tankers* v. *The Long Branch*, 258 F.2d 757 (2d Cir. 1958), at pp. 772-773; *The Chickie*, 141 F.2d 80 (3d Cir. 1944), at pp. 84-85.

[19] In its Order of January 21, 1969, the District Court correctly observed: "Limitation proceedings are considered to be equitable in nature. . . . The Court having once taken jurisdiction in the limitation proceedings may proceed to determine all matters relating to the controversy. . . . In seeking the benefits of the Limitation Act, Unterweser should recognize that this Court has jurisdiction to determine the entire controversy. In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated. . . . In the case at bar there are only two parties litigating the dispute occasioned by the events of January 9, 1968. Suit was initially filed in this Court, this Court has ruled that it does have jurisdiction over the controversy, and this Court also has taken jurisdiction in the limitation action. The proposition that the case should at the same time be prosecuted in another forum is not well received.

"Although Unterweser again argues in its Motion to Stay that

The Court of Appeals, affirming, concluded:

(1) that Unterweser's petition for limitation subjected it to the full equitable powers of the district court (A. 237);

(2) that the forum clause *in and of itself* did not *compel* the district court to stay proceedings in the limitation action so that the parties might litigate in England (A. 241);

(3) that apart from the forum clause the circumstances supported a retention and determination by the district court (A. 241); and

(4) that the district court did not abuse its discretion in choosing not to relegate Zapata to the London forum. (A. 244).

We next consider, in detail, the forum clause which Unterweser has argued:

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the venue provisions of the towage contract are *controlling*, this Court has already passed on that contention. While at that time the Court did not rule that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. *In addition*, Unterweser has *voluntarily invoked this Court's jurisdiction* in filing this limitation proceeding in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined.

"This Court having first acquired jurisdiction over the parties and the subject matter of this controversy both through the complaint in 68-21 Civ. T. and the limitation action filed by Unterweser in this cause, does have the power to restrain the parties before it from litigating the same matters elsewhere. . . . *"The balance of convenience is strongly in favor of litigation in this forum initially* and to allow the same action to be prosecuted simultaneously elsewhere would cause inequitable hardship. Such an action could only tend to frustrate and delay the speedy and efficient determination of the cause in this Court. The Court feels that the parties being properly before it should be restrained from proceeding further in the foreign court." (A. 225, 227-8). (emphasis added).

(1) *defeated* the jurisdiction of the district court (A. 81);

(2) is *controlling* (A. 227); and

(3) *required* a stay of the limitation case (A. 238).

II

The Forum Clause, Which Unterweser Drafted, (1) Is Non-Exclusive; (2) Is Not Addressed to an Action in Rem; and (3) Does Not Purport, and Should Not Be Construed, to Apply to Zapata's Claim in a Limitation Action Unterweser Commenced.

The forum clause provides:

> "Any dispute arising must be treated before the London Court of Justice."[20]

A reading of the clause drafted by Unterweser demonstrates that the usual exclusive jurisdiction clause language, e.g., "to the exclusion of any other judge"[21] or "to the exclusion of proceedings in the courts of any other country"[22] *was not used.* The clause confers jurisdiction

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[20] General Towage Conditions, Par. 8. (A.27).

[21] A typical example of *exclusionary* language is:

> *"This agreement shall be subject to the Law of the Netherlands.* The settlement of all disputes arising from this agreement shall, *to the exclusion of any other judge,* be submitted to the District Court at Rotterdam. . . ." *Chemical Carriers, Inc.*, v. *L. Smit & Co.'s Internationale Sleepdienst*, 154 F.Supp. 886 (S.D.N.Y. 1957), at 888. (emphasis added)

[22] Another typical example is:

> "Governing Law: Unless otherwise herein expressly provided this Bill of Lading *shall be construed by Japanese Law,* and the rights of the parties thereunder determined accordingly. Any claim for loss, damage . . . arising out of this Bill of Lading shall be dealt with, at the option of the carrier, in the courts of Japan *to the exclusion of proceedings in the courts of any other country." Takemura & Co.* v. *The S.S. Tsuneshima Maru*, 197 F.Supp. 909 (S.D.N.Y. 1961), at 910. (emphasis added)

on the London Court but stipulates nothing in restriction of proceedings in other courts.[23] Such agreements should be strictly construed and not extended by implication.[24]

The omission was not the result of any unfamiliarity with the concept on Unterweser's part. Unterweser's towage contracts ordinarily provide for ". . . *exclusive* German jurisdiction and for the application of German law." (von Aswegen Affidavit, A. 22). The contract, with the forum clause, was drafted in Germany by Unterweser; the forum clause was unchanged in the final draft; and there was no discussion of the clause by the parties' representatives before or after Unterweser tendered its draft of the

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[23] A provision that:

> "Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."

elicited this comment from Judge Friendly speaking for the Second Circuit en banc:

> "Other possible bases [of distinction from *Muller*] would be the failure of the instant bill of lading to identify within its four corners the forum to which litigation was *confined*. . . ." *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) at 202. (Emphasis added)

Judge Moore, concurring with the result at p. 205, said: "The bill [of lading] itself contained no clear contractual agreement *providing for exclusive jurisdiction* in Norwegian courts. Furthermore, the action here was solely against the ship *in rem*." (emphasis added)

[24] *The Monrosa* v. *Carbon Black Export, Inc.* 359 U.S. 180, 182-3 (1959): ". . . we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have."

Engel v. *Shubert Theatrical Co.*, 151 N.Y.S. 593 (Sup. Ct. App. Div. 1915). The forum clause read: "In case of dispute, both contracting parties agree to submit to the jurisdiction of the Vienna courts." Court overruled defendant's contention it was immune from suit in the New York court, held the parties did not agree to submit their disputes to Vienna courts *only*, and that "*it is entirely plain that such agreements should be strictly construed, and should not be extended by implication.*" (emphasis added)

contract to Zapata.[25] If there is doubt whether the clause provided for *exclusive* London jurisdiction, that doubt must be resolved against Unterweser, the draftsman.[26]

In addition, the forum clause does not apply to the *in rem* proceeding against the BREMEN in Zapata's first filed suit. The distinction between suits *in personam* and those *in rem* to enforce maritime liens has been recognized in the courts of maritime nations from time immemorial.[27] Unterweser's appreciation of the distinction is shown by these provisions in the contract it drafted:

> (1) the stipulation for a *lien* on the CHAPARRAL for the towage charge in paragraph 9 (A. 26);
>
> (2) the stipulation for penalties incurred by "Urag or by the *tug* . . .", to be reimbursed by Zapata, in paragraph 11 (A. 26);
>
> (3) the "Claim and Suit" provision in paragraph 12: "Urag and the *tug* . . . shall be discharged from liability unless . . ." a claim in writing is made, and an action is brought, within a specified time period. (A.26).
>
> (4) the indemnity provisions in favor of Unterweser, paragraph 4 of the "General Towing Conditions", as to ". . . the liability of the tug . . ." (A.27). (emphasis added)

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[25] Affidavit of Hoyt Taylor, Zapata's Vice President. (A. 62, 63).

[26] 17A C.J.S., § 324, Construction Against Party Using Words, p. 217, et seq., states:

> "It is a general rule of construction that where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises; . . . and any ambiguity in a contract, doubt or uncertainty as to its meaning should be resolved *against the party who prepared the contract or is responsible for the verbiage.*" (emphasis added)

[27] Benedict on Admiralty, 6th Ed., vol. 1, §§ 11 and 12, pp. 17-24; Gilmore Black, *The Law of Admiralty* (1947), §1-12, p. 30 et seq.

But the Unterweser drafted forum clause does not mention actions "in rem", claims or actions "against the tug".

In deciding *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), this Court observed that the forum clause spoke of proceedings against ". . . the Captain or Shipowners of their Agents . . ." (at p. 182). Another clause in the bill of lading there under consideration specifically recognized suits both *in rem* and *in personam* where it provided " . . . the Carrier and the ship shall be discharged from all liability . . .", unless a claim was made in writing, and an action brought, within a specified time. (footnote, at 182). The Court said the language in the forum clause was particularly appropriate to a restriction of the clause to *in personam* actions, noted the shipowner was the draftsman, refused to "stretch" the language, and held the forum clause did not apply to the *in rem* action.

The right to proceed *in rem* is of enormous importance to maritime litigants. Through action against the vessel the plaintiff may obtain security to respond to judgment from a foreign shipowner-defendant whose sole asset may be the offending vessel. Without the security, the United States plaintiff may get a judgment, *in personam*, only to find that the vessel has incurred maritime liens later in time but higher in priority than his judgment, or has been employed in a trade that never brings it to this country, or even has been lost completely. The result is the same: a plaintiff with a judgment and insufficient assets of the defendant upon which the marshal can levy. These are the considerations which prompted the Court of Appeals for the Fifth Circuit to observe:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean going carriers it seems that one of the most uni-

versally recognized rules of law is that which gives the right to libellant, possessing a maritime lien against the vessel, to proceed *in rem* in the jurisdiction where the vessel is found."[28]

That part of Zapata's first filed suit brought *in rem* against the BREMEN asserted a maritime lien (A.9) and sought recovery for negligent towage (A.8, 9), a maritime tort. It did not even colorably contravene Unterweser's forum clause.[29]

But more importantly the forum clause should not be construed to preclude Zapata from filing and prosecuting its claim in the limitation suit Unterweser started or from answering the counterclaim Unterweser there asserted against Zapata, because:

1. The forum clause neither expressly nor by implication precludes assertion of claims in Unterweser commenced proceedings in a non-contract forum, and

2. Unterweser subjected itself to the jurisdiction of the district court by filing the limitation of liability suit in Tampa. This constituted a waiver of the forum

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[28] *Motor Distributors Ltd.* v. *Olaf Pedersen's Rederei, A/S*, 239 F.2d 463 (5th Cir. 1957), at 467.

[29] It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is *ex delicto* and not *ex contractu*. *Stevens* v. *The White City*, 285 U.S. 195 (1932); *South, Inc.* v. *Moran Towing and Trans. Co., Inc.*, 360 F.2d 1002 (2d Cir. 1966); *Bisso* v. *Waterways Trans. Co.*, 235 F.2d 741 (5th Cir. 1956). This Court, in *Stevens* v. *The White City, supra*, held (285 U.S., at 202):

> "... And the rule that the lien for damages occasioned by negligent towage takes precedence of liens for supplies previously furnished the offending vessel rests upon the ground that the claim, like those in collision, *is one in tort* arising out of the duty imposed by law *and independently of any contract or consideration for the towage.*" (emphasis added)

clause, or estopped Unterweser from relying upon it with respect to responses the limitation suit evoked.

In fairness we should say that we do not understand Unterweser to argue that the forum clause should *preclude* Zapata from responding to the limitation action.

The majority of the courts to which such clauses have been presented for enforcement have held that they are void and not to be enforced at all.[30] If, however, the forum clause is enforceable at all, it is only enforceable if reasonable. So far as we have found, no American court has considered itself *bound* to remit a party to a forum stipulated by contract without regard to facts and circumstances extrinsic to the contract. We next address ourselves to the question whether enforcement of the forum clause in Unterweser's towage contract would have been reasonable in the circumstances.

III

Unterweser's Motion to Stay Was Properly Denied Because It Would be Unreasonable to Enforce the Forum Clause Under the Facts of This Case.

Those courts which have not disregarded the forum clause altogether have looked to the circumstances in each case to see if enforcement was reasonable at the time of litigation and not at the time of contract.[31]

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[30] Annot., 56 A.L.R.2d 300 (1957); 17 C.J.S., Contracts, § 229(1), p. 1069 (1963 Ed.).

[31] ". . . The modern and correct rule is, that . . . a court . . . should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum *and where such agreement is not unreasonable at the time of litigation.*" *Central Contracting Co.* v. *C.E. Youngdahl & Co.*, 209 A. 2d 810 (Sup.Ct. Pa. 1965) at 816 (emphasis added);

Factors to be Considered

Factors the courts have considered relevant in deciding (1) whether enforcement of a forum clause was reasonable; or, (2) whether a party should be relegated to a foreign court under the doctrine of *forum non conveniens* in particular cases, include:

1. Whether the rights or remedies of the party resisting enforcement will be diminished substantially if he is compelled to litigate in a foreign forum;[32]

2. Whether there was a significant difference in the availability of testimony and other evidence militating in favor of one forum over the other;[33]

"There will always be open to either party the opportunity to present whatever evidence will move a court *in the particular circumstances* not to decline to exercise its undoubted jurisdiction." *Central Contracting Co.* v. *Maryland Casualty Co.*, 367 F. 2d 341 (3rd Cir. 1966), at 345 (emphasis added);

"But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable *in the setting of the particular case* it may properly decline jurisdiction and relegate a litigant to the forum to which he assented." *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F. 2d 806 (2d Cir. 1955), at 808. (emphasis added)

[32] *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale*, 154 F.Supp. 886 (S.D.N.Y. 1957); towage contract; plaintiff deprived of remedy in foreign forum, case retained; *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955) plaintiff's rights not significantly affected, case declined; *General Motors Overseas Operations* v. *S.S. Goettingen, et al.*, 225 F.Supp. 902 (S.D.N.Y. 1964) plaintiff's rights affected, case retained; *Takemura & Co.* v. *The S.S. Tsuneshima Maru*, 197 F.Supp. 909 (S.D.N.Y. 1961) plaintiff's rights not significally affected, case declined.

[33] *Hawaii Credit Card Corp.* v. *Continental Credit Card Corp., et al.*, 290 F.Supp. 848 (D.C. Hawaii 1968) case retained because most evidence in non-contract forum; *Murillo Ltda.* v. *The Bio Bio*, 127 F.Supp. 13 (S.D.N.Y. 1955), aff'd *per curiam*, 227 F.2d 519 (2d Cir. 1958); *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., supra; Takemura & Co.* v. *The S.S. Tsuneshima Maru, supra.*

3. The citizenship of the parties and the nationality of the vessels involved;[34]

4. Which forum had more significant contacts with the subject matter of the litigation;[35]

5. Where the contract was to be, or had been, performed;[36]

6. Whether the contract had been procured through the fraud or overreaching of the party seeking enforcement;[37]

7. Whether the foreign forum would accept the case and decide the dispute.[38]

To the factors presented by the record in this case for the consideration of the District Court and the Court of Appeals we now turn.

As to the Effect of Enforcement on Zapata's Substantive Rights

Under English law the exculpatory clauses in the tow-

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[34] *Swift & Co. Packers* v. *Compania Colombiana Del Caribe S.A.*, 339 U.S. 684 (1950) suit by U.S. citizen against foreigner evokes different considerations from suit between foreigners; *Volkswagen of America, Inc.* v. *S.S. Silver Isle*, 257 F.Supp. 562 (N.D. Ohio 1966) libelants American nationals, Court's discretion further limited; *States Marine Lines, Inc.*, v. *The M/V Kokei Maru*, 180 F.Supp. 255 (N.D. Cal. 1960) American nationality of libelant sufficiently important to justify retention.

[35] *Cerro De Pasco Copper Corp.* v. *Knut Knutsen*, O.A.S., 187 F.2d 990 (2d Cir. 1951); *Wm. H. Muller & Co., Inc.* v. *Swedish American Line Ltd., supra; Murillo Ltda.* v. *The Bio Bio, supra.*

[36] See cases, footnote 35.

[37] Zapata does not contend Unterweser procured contract through fraud or overreaching.

[38] Zapata concedes the London court would take the case and try it.

age contract[39] would be enforced so as to relieve Unterweser from liability for its own negligence in the performance of the tow.[40] In the United States those same exculpatory clauses should not, under *Bisso* and *Dixilyn*,[41] be effective to relieve Unterweser of such liability, because United States courts apply United States maritime law to high seas torts between American and foreigners.[42] And United States courts will not enforce exculpatory provisions that are valid under English law if

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[39] "1. . . . URAG [Unterweser], their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

"2(b) Damages suffered by the towed object are in any case for the account of its Owners. [Zapata]". (A. 26).

[40] Opinion of English maritime law expert Bateson (A. 65-71). Affidavit filed in district court on April 22, 1968. Unterweser has not filed a controverting affidavit.

Unterweser suggests at p. 25 of its brief that it is premature and speculative to assume that an English court would apply English law to the contract. But Mr. Justice Karminski said the inference when parties have agreed on a forum is that the forum law is intended to be applicable. (A. 211, 212). And Lord Justice Willmer says that Unterweser argued that English law would govern the contract as a ground upon which the London Court should grant leave to serve Zapata outside England. (A. 216, 217).

English court recently concluded English law governed a contract (which did not provide applicable or controlling law) when comity might have prompted a conclusion that the law of the Netherlands applied. *Coast Lines Ltd.* v. *Hudig & Veder N.V.*, 2 Lloyd's Rep. 390 (1971).

[41] *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1963). *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) [following Bisso], reversing Fifth Circuit Court of Appeals, 303 F.2d 237 (1967). *Dixilyn* firmly settles law. Exculpatory provisions void and unenforceable, even when towage contract proven to have been freely negotiated and proof shown towage rate reduced in consideration of exculpatory clause. See also, *Offshore Company* v. *G. & H. Offshore Towing Co.*, 262 F.Supp. 282, 288 (S.D. Tex. 1966).

[42] *The Scotland*, 105 U.S. 24 (1881); The Belgenland, 114 U.S. 355 (1885); The Gylfe v. The Trujillo, 209 F.2d 386 (2d Cir. 1954).

they are violative of United States public policy even if English law were otherwise applicable.[43] Our courts determine the amount of the limitation fund under American law.[44]

If it be assumed that the English court would not give effect to the exculpatory clauses and on the evidence would find Unterweser guilty of negligence producing the loss, but would go on to find that Unterweser was entitled to limit its liability, the amount of the limitation fund in England would not exceed $80,136.[45] If the American court found the exculpatory clauses ineffective to relieve Unterweser of liability, found that the loss was the result of Unterweser's negligence, and found that Unterweser was entitled to limit its liability, the amount of the limitation fund would be not less than $1,390,000.

This striking difference in results on the same findings as to cause of loss and entitlement to limitation flows from the fact that, since this was a high seas incident and maritime torts are involved, each court would apply its own law in connection with the limitation fund. The English limitation fund is determined by the tonnage of the vessel and, the BREMEN being a tug of comparatively small tonnage, the fund is likewise small ($80,136). The limitation fund in this country would be determined by the value of the BREMEN at the end of the voyage. Unterweser has stipulated that the value of the BREMEN at the operative time was not less than $1,390,000.

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[43] *The Kensington*, 183 U.S. 263 (1902); *Oceanic Steam Nav. Co.* v. *Corcoran*, 9 F.2d 724 (2d Cir. 1925)

[44] *The Titanic*, 233 U.S. 718 (1914); *The Western Farmer*, 210 F.2d 754 (2d Cir. 1954).

[45] Unterweser (A. 91) and English maritime law expert Bateson (A. 324-329) agree the English limitation fund would not exceed 33,600 pounds sterling, the equivalent of $80,136.

Following *Muller*[46] and applying its test of reasonableness, the district courts in New York have declined to relegate the plaintiff to a foreign forum where the practical effect of enforcement might deprive the party resisting the forum clause of all remedy,[47] or would substantially affect its substantive rights.[48]

In *Central Contracting Co.* v. *Maryland Casualty Co.*, *supra*, the Third Circuit, in passing on the reasonableness

[46] *Wm. H. Muller & Co., Inc.*, v. *Swedish American Line Ltd.*, 224 F.2d 806 (2d Cir. 1955). Where there were (1) a Swedish shipowner (who had *not* started a limitation suit in the U. S.), (2) Swedish crew-members all residing in Sweden, (3) most of the evidence available in the Swedish court, (4) an *exclusive* Swedish forum clause, (5) no American fact witnesses, (6) *undisputed showings that the Swedish court would apply the same measure of damages as American maritime courts, and* (7) *that limitation proceedings under Swedish law were no more restrictive than under American law*, the Second Circuit Circuit held the forum clause was not unreasonable and would be enforced.

[47] *Chemical Carriers, Inc.* v. *L. Smit & Co.'s Internationale Sleepdienst*, 154 F.Supp. 886 (S.D.N.Y. 1957). Dutch tug (Smit), on voyage tow (Chemical Carriers vessel), salvaged German ship. Under American law Chemical Carriers was entitled to participate in salvage award, but not so under Netherlands law. Court refused to enforce exclusive forum clause (Rotterdam) because to do so would be unreasonable, holding (888): ". . . in view of . . . Netherlands law, the practical result of compelling libelant to litigate in Rotterdam courts might well be to deprive it of all remedy". The court, recognizing the reasonableness test of *Muller* was applicable, distinguished same, pointing out ". . . there was no showing [in *Muller*] . . . . that the libelant would be without effective remedy in the foreign forum."

[48] *General Motors Overseas Operations* v. *S. S. Goettingen*, 225 F.Supp. 902 (S.D.N.Y. 1964). The court, applying *Muller* test of reasonableness, declined to enforce forum clause on ground that to remit plaintiffs to German courts would *substantially affect their rights*. The interpretation of "peril of the sea" under German law was such that a storm, not severe enough to free a carrier from liability under American law, might be sufficient under German law to free the carrier from liability. The court distinguished *Muller* saying (906): ". . . the Court [*Muller*] clearly pointed out that the foreign law would be 'no more restrictive' than United States law on the shipper's rights."

of a forum clause (to relegate from Pennsylvania to New York) held: ". . . it should be respected . . . *so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.*" (367 F.2d, at 345). (emphasis added) And further stated: "We are mindful that cases may be imagined in which the requirement of a contract limiting resort to a single forum may be the instrument of injustice."

Section 3 of the Model Choice of Forum Act, approved by the National Conference of Commissioners on Uniform State Laws (1968) adopts this principle. 17 Am. J. Comp. L. 294-295 (1969).[49]

Reese also adopts this view.[50]

The district court in ruling on Unterweser's jurisdiction-contesting motions in Zapata's first suit stated: "Plaintiff [Zapata] has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country." (A.82).

As correctly stated by the Fifth Circuit: "The district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the contro-

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[49] "Section 3 [Action in Another Place by Agreement.] If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless . . . .

(2) *the plaintiff cannot secure effective relief in the other state,* for reasons other than delay in bringing the action, . . ." (emphasis added).

[50] ". . . effect should be denied the [forum] clause if there is reason to believe that the courts of the selected state would . . . *deny [plaintiff] relief to which he was entitled. . . .*" (emphasis added) Reese, *The Contractual Forum: Situation in the United States,* 13 Am. J. Comp. L. 187, 189 (1964)

versy, *could raise a bar to recovery by a United States citizen . . .*" (A.243). The Court of Appeals also held: "Zapata, the only claimant in the limitation action, is a United States citizen. The discretion of the district court to remand the case to a foreign forum was consequently limited. This is especially true since, as the court noted, there are indications that *Zapata's substantive rights will be materially affected if the dispute is litigated in an English court.*" (A.242). (emphasis added)

It would be unreasonable to relegate Zapata to the English forum where it would probably be deprived of a remedy available to it in the American court, and where the English limitation fund amounts to about 6% of the American fund.

As to the Balance of Convenience of Putting on Proof at Trial

At any trial which disposes of all the controversies between the parties, there will have to be evidence on these issues:

1. Whether Unterweser was instructed by Zapata to tow the rig in jack-up water depths, as the CHAPARRAL's legs had not been locked together (A.108);

2. Whether Unterweser complied with the instructions it received from Zapata so to proceed (A.109);

3. Whether the CHAPARRAL was seaworthy for the intended voyage from the Mississippi Passes to the Florida Straits in coastwise waters, i.e., jack-up water depths;

4. The amount of the loss Zapata has sustained by reason of repairs to physical damage and by reason of loss of use of the CHAPARRAL;

5. The value of the CHAPARRAL as she was brought to refuge at Tampa;

6. The value of the BREMEN as of the end of the voyage at Tampa;

7. The amount of the loss Unterweser has sustained as a result of the physical damage to the BREMEN's towing gear suffered when the bow leg of the CHAPARRAL fell;

8. The amount to which Unterweser is entitled for hire from the time the voyage ended at Tampa; and

9. What services were rendered by Unterweser (alleged to constitute salvage) in re-establishing the towing connection with the CHAPARRAL after the casualty.

The location of the sources of the evidence on these issues is:

1. As to the routing instructions, Zapata's evidence will consist of the testimony of Zapata's Hoyt Taylor and James Booth, both of Houston (A.415), and marine surveyors Noel Thompson of New Orleans and John Hellendoorn of New Jersey (A.145). So far as can be seen, Unterweser's evidence on this issue will consist of the testimony of Marine Superintendent Otto Litwinski and Captain Diedrich Kriete, both residents of Germany and both of whom have been deposed.

2. As to Unterweser's compliance with the instructions received, Zapata's evidence will consist of the testimony of (a) rig mover Oscar Willard of Houston, Texas, (b) tool pusher Wilton Johnson, resident of Louisiana (A.145), and (c) the depositions of Captains Litwinski and Kriete.

3. As to the seaworthiness of the CHAPARRAL for the intended voyage, Zapata's evidence will consist of the testimony of (a) Messrs. Thompson and Hellendoorn (A.145),

already mentioned; (b) Mr. Booth and Mr. Willard (A.145); (c) a representative of Breit Engineering Co. of New Orleans (this company did pre-voyage studies of the stability of the CHAPARRAL as she was fitted out for the tow) (A.146); (d) Sam Bryan of Shilstone Testing Laboratories, Houston, Texas (a metallurgist who examined and tested portions of the remains of the damaged legs of the CHAPARRAL following her arrival at Tampa) (A.146); (e) several representatives of R. G. LeTourneau, Inc. of Longview, Texas, the builders of the CHAPARRAL and the concern which assisted in preparing the CHAPARRAL for the voyage in tow of the BREMEN (A.146). Unterweser's evidence will surely include the testimony of (a) Rush Johnson and J. R. Bencal, marine surveyors of Houston who examined the CHAPARRAL at Tampa in her then damaged condition (A.146); and (b) representatives of Pittsburgh Testing Laboratories at Tampa and at Pittsburgh [illegible] examined and performed metallurgical tests upon the [illegible]ons of the remains of the damaged legs of the CHAPA[illegible]RAL. (A.146).

4. As to the amount of the loss Zapata has sustained as a result of the physical damage repairs and related services, Zapata's evidence will include the testimony of (a) New Orleans marine surveyor Joseph Tynan, who examined the CHAPARRAL and made a post casualty condition report at the request of Zapata (A.146); (b) representatives of R. G. LeTourneau, Inc., the company which accomplished the repairs to the CHAPARRAL; and (c) representatives of 14 companies that rendered various services. (A. 147-148). Unterweser's evidence will surely include that of their marine surveyors, Johnson and Bencal, above mentioned.

As to the value of the loss of use of the CHAPARRAL, Zapata's evidence will include the testimony of its managerial level operating personnel based in Houston.

5. As to the value of the CHAPARRAL upon arrival at Tampa (from which any salvage award would have to be carved), Zapata's evidence would include the testimony of (a) New Orleans surveyor Tynan, representatives of R. G. LeTourneau, Inc. of Longview, Texas; and (b) Houston based Zapata personnel. Unterweser's evidence will probably include testimony of Messrs. Johnson and Bencal of Houston. There is, of course, no area on earth richer in personnel who know the value of oil rigs than the United States Gulf Coast.

6. As to the value of the BREMEN at the end of the voyage (material in determining the amount of the limitation fund and as a factor in fixing any salvage award), Zapata's evidence will include the testimony of Capt. A. Holm-Anderson of New York and Mr. Jack Mowbray also of New York. (A. 148). Unterweser's evidence will probably include the testimony of marine surveyor Harry Reinecke of New Orleans, who surveyed the BREMEN for its value at Unterweser's request. (A. 148).

7. As to the amount of the loss Unterweser sustained as a result of the damage to the BREMEN's towing gear, both parties can call upon Mr. Thomas A. Addison, a marine surveyor of Tampa, who was jointly engaged to survey that damage. (A. 147).

8. As to the amount to which Unterweser is entitled for tow hire, all material testimony has been preserved by the depositions already taken. So, this will be largely a matter of mathematical calculation.

9. As to the alleged salvage services rendered by Unterweser in re-establishing the towing connection and the surrounding circumstances, the evidence must consist of the testimony of the crew of the BREMEN and of the riding crew of the CHAPARRAL. All of this testimony has been preserved in depositions.

Upon consideration of the foregoing facts the district court found that *the balance of convenience is strongly in favor of litigation in Tampa.* (A. 227).[51]

Reese says a forum clause should be enforced:

> ". . . unless the court finds the selected state would be an inappropriate, or *manifestly inconvenient,* place for the suit. . . . Likewise, effect should be denied the clause *if the selected state is a seriously inconvenient one* for the trial of the action, as might be true in a situation where the occurrence sued upon took place in a distant place from which, if the trial were to be held in the selected state, it would be necessary to transport large numbers of witnesses.[51a]

The Model Choice of Forum Act of the National Conference of Commissioners on Uniform State Laws (1968) provides that suit brought in a state other than the selected state should be dismissed, unless the selected state *"would be a substantially less convenient place for the trial"* than the state in which the suit had been brought. 17 Am. J. Comp. L. 294-295 (1969). (emphasis added)

Judge Wisdom, dissenting from the panel decision, seems to agree with this principle, saying: "Is the designated forum *seriously inconvenient* for the trial of the action? Since we recognize in the doctrine of *forum non conveniens* that a jurisdictionally selected forum should sometimes give way to another in the face of strong arguments of convenience, *it would be anomalous to ignore those considerations where the parties have selected a forum without the benefit of hindsight.*" (A. 268, 269). (emphasis added)

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[51] On the facts, Unterweser offered the district court one affidavit of von Aswegen stating: that the BREMEN was built in Germany, her home port was in Germany, the BREMEN's crew were German; and von Aswegen's opinion that the forum clause constituted the "balance of convenience". (A. 21-23).

[51a] Reese, *supra.*

The evidence shows that trial in London would be seriously inconvenient. Thus, enforcement of the forum clause here would be unreasonable, even under the "modern rule". The district court's words were: "the balance of convenience" is strongly in favor of Tampa. (A.277).

Regarding the Citizenship of the Parties and the Nationalities of the Parties

Zapata is incorporated in Delaware, with its principal office in Houston, Texas. (A.58). 97% of the stock is owned by citizens of the United States. (A.58). The CHAPARRAL is registered under the laws of the United States and its home port is Houston, Texas. (A.59;61). The crew employed by Zapata to ride the CHAPARRAL on the intended voyage were citizens and residents of the United States. (A.145).

Unterweser is a limited liability company organized under the laws of West Germany. All of the crew of the BREMEN, the two seamen who were detailed from the BREMEN to serve as riding crew of the CHAPARRAL, and Marine Superintendent Litwinski, who also rode on the CHAPARRAL, were citizens and residents of West Germany. The BREMEN is registered under the laws of West Germany with a home port at Bremerhaven.

As to the Country With Which the Subject Matter of the Litigation Has the Most Significant Contacts

Only the United States and Germany have anything which might be realistically considered contacts with the subject matter of the litigation. The CHAPARRAL was built in the United States. She was made ready for the voyage on the Mississippi River in Louisiana. After the casualty she was brought to a U. S. port of refuge and surveyed. She was repaired in the U. S. The accident

occurred roughly halfway from New Orleans to Key West. Her owner is an American corporation. Approximately 40 witnesses as to the preparations for the voyage, the events of the voyage, the cost of repairs and the value of both the BREMEN and the CHAPARRAL, live in this country.

The crew of the BREMEN and Marine Superintendent Litwinski, whose depositions have been taken, are residents of Germany.

There is nothing English in the picture (except the contract is written in English). No English company, no English crew members, no English preparations, no English performance and no English witnesses (with the possible exception of one expert witness engaged by Unterweser to observe during the testimony of the American riding crew of the CHAPARRAL).

So far as appears, no witness to any operative fact resides in England. And England is about 4000 miles from the scene of the accident.

Regarding Performance Under the Contract

Performance was intended to commence in the United States and to continue across the seas to a point off Ravenna, Italy. In any event, performance commenced in the United States with the preparation of the CHAPARRAL for the tow and continued in the United States from the time the BREMEN got underway with the CHAPARRAL in tow until the flotilla passed out of the territorial waters of the United States into the Gulf of Mexico. Performance, at least in one sense, in the United States was resumed when the flotilla reentered United States waters on the approach to Tampa Bay. From Unterweser's point of view, performance doubtless began with the outfitting

of the BREMEN for the voyage in Germany, and continued with the dispatch of the BREMEN from Bremerhaven to New Orleans to be in position to undertake the tow when the CHAPARRAL was ready.[52]

Summary Regarding Reasonableness

Upon a consideration of the forum clause, the factors above discussed, and Unterweser having filed suit for limitation of liability, the district court denied Unterweser's Motion to Stay, holding:

> "Although Unterweser again argues in its Motion to Stay that the venue provisions of the towage contract are controlling, this Court has already passed on that contention.[53] While at that time the Court did not rule

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[52] See pp. 8-9 of this Brief for details of performance under the contract by Zapata's and Unterweser's employees.

[53] In its Memorandum and Order entered in Zapata's first filed suit, the court denied Unterweser's motion (1) to dismiss for lack of jurisdiction, (2) requesting the court to decline to exercise its jurisdiction on the ground of forum non conveniens, and (3) to stay pending submission to the English court. The court held:

> "The citizenship of the parties has been given. Plaintiff chose and obtained the jurisdiction of this Court. The prelude, including a partial performance, alleged casualty and aftermath here all occurred along or near the Gulf Coast of the United States of America and within or adjacent to the jurisdiction of the judicial circuit of which this Court is a part.
>
> "A great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here. Members of the Bar of this Court have spent considerable time in the investigation and preparation of the trial of this case, 33 oral depositions have been taken; including all of the officers and members of the crew of Defendant's tug and the Defendant's riding crew on Plaintiff's drill barge. *Defendant itself has taken oral depositions and with the aid of this Court obtained production of documents, plans and other data.*
>
> "Plaintiff has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country." (emphasis added)

> that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. *In addition, Unterweser has voluntarily invoked this Court's jurisdiction in filing this limitation proceeding* in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined." (emphasis added)

Zapata submits the district court acted within its lawful judicial discretion in so doing. At the very least, the foregoing factors show the court did not abuse its discretion. Unterweser has presented no argument that the court abused its discretion.

However, Unterweser does argue that the district court erred in denying Unterweser's motion for stay because it acted upon wrong principles of law, mistakenly assigned to Unterweser the burden of proof and considered irrelevant factors in reaching its decision. Unterweser argues further that the Court of Appeals misconceived the law in affirming the decision of the district court.

In the next section of this brief we present Zapata's response to those arguments.

IV

Unterweser's Attack on the Decisions Below Urges a Focus on Circumstances at the Time of Negotiation of the Contract, Which No Court Has So Far Approved. This Argument Disregards the Fact That the District Court Looked to the Factors Considered by Courts Which Have Followed the "Modern Rule" and Considered Them at the Time of Litigation in Keeping with the Universal Practice.

Unterweser's argument is that the decisions below should

be reversed because forum clauses are (or should be) valid *per se*. It necessarily proceeds on the premise that Unterweser's forum clause would have been enforced if the courts below had (1) considered it was valid per se, and (2) cast upon Zapata the burden of demonstrating that enforcement would, in this case, be unreasonable.

Zapata submits that the presumption of validity for which Unterweser argues and the burden of proof of unreasonableness are in fact but two facets of the same question: Whether evidence that enforcement of the forum clause would be reasonable, or not, should be introduced first by the party seeking enforcement or by the party seeking to avoid enforcement? It seems that Unterweser would have this court hold that there is an irrebuttable presumption of the validity of a forum clause without, however, stating the point so baldly.

Zapata, recognizing that some courts have followed the "modern rule", was not content to rely upon the established or majority rule that forum clauses are invalid *per se*, but went on to make a record of the facts which tend to the conclusion that enforcement in this case would be unreasonable, including: (1) the name and addresses of prospective witnesses with an indication of the subject matter as to which each was to testify (A.50-57, A.144-148); (2) an indication of Zapata's view of the manner in which the forum clause came to be in the contract, (A.62-64); (3) the affidavits of an expert on English law regarding the enforceability of exculpatory clauses in England, (A.65-70), and the amount of the English limitation fund, (A. 324-329); (4) the American ownership of the CHAPARRAL, (A.58-61); and (5) a recapitulation of the pretrial work which had been done in the Tampa court: (A. 148-151).

Unterweser, unless protected in its insistence on the

London forum by an irrebuttable presumption of validity of the forum clause, then surely had a duty to present to the district court such facts as Unterweser considered relevant on the question of reasonableness. The only offering made by Unterweser was the affidavit of Mr. von Aswegen.

The district court thus had for consideration the forum clause, the points or factors submitted by Zapata, and those made in Mr. von Aswegen's affidavit.

The point here is that once a party resists enforcement of a forum clause with evidence that enforcement would be unreasonable, even if that clause travels under a presumption of validity, the other party has the responsibility of showing the court the evidence which seems to that party to show enforcement would not be unreasonable. In Point III we analyzed (1) the factors the "modern rule" courts have considered bearing on the reasonableness of enforcement; (2) the evidence as to such factors presented in this case; and (3) the decision of the courts below. Zapata submits that it carried the burden of showing that enforcement would be unreasonable.

That the courts below spoke in terms of "convenience", rather than "reasonableness", should not obscure the fact that those courts considered all of the factors called for in application of the "modern rule". They concluded that the district court should not stay the parties from litigating all the disputes in Tampa so that they could litigate some of them in London.

It cannot be argued fairly that the district court was not aware of the "modern rule" and of the principles followed by the courts in using it. It surely knew that Unterweser was strongly urging enforcement of the forum clause. Just as surely it knew that Zapata contended enforcement

would be unreasonable, and devastating to Zapata's prospects of any recovery for its loss. It knew what the circumstances surrounding the voyage were.

On the one hand the district court had the (1) forum clause; (2) the residence of the crew of the BREMEN (whose testimony has been preserved by deposition); and (3) the nationality of the BREMEN and of its corporate owner. On the other hand, that court had (1) the 40-odd witnesses who were resident in the United States (ten of whom had been deposed); (2) the nationality of the CHAPARRAL and its owner; (3) the contacts between the subject matter and the United States; and (4) the effect on any recovery by Zapata reasonably to be anticipated if the case were sent to London. These factors cannot, of course, be weighed in any mechanical scale. The trial judge simply had to use his best judgment as to what would produce a right result in this case. And that is what he did.

Unless this Court is ready to say that the presence of a forum clause in such a contract outweighs all evidence tending the other way, a result that even Judge Wisdom does not urge, then it seems that the decision has to flow from a consideration by this Court whether the district judge abused his discretion. And that discretion may not be disturbed unless abused. *Charter Shipping Co., Ltd.*, v. *Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930); 5A, C.J.S., Appeal and Error, § 1583, p. 24 (1958 Ed.)

Unterweser's suggestion that the Court of Appeals erred in determining that reasonableness of the clause must be determined by the exclusive application of the factors considered under the doctrine of *forum non conveniens* seems illusory, because the very same factors are considered in determining whether the enforcement of a forum clause is reasonable as are considered when the question is raised in the *forum non conveniens* context.

A close reading of Unterweser's brief shows that Unterweser does not argue that other factors should be considered, but merely that the factors should be considered in the light of the circumstances *existing at the time of contract*. In urging this proposition, Unterweser takes leave of its champion, Judge Wisdom, who said, dissenting, that ". . . it would be anomalous to ignore those considerations [of convenience] where the parties have selected a forum without the benefit of hindsight". (A. 269).

Suppose the district court had said "enforcement is unreasonable" in announcing its decision, rather than "the balance of convenience is strongly in favor of litigation in this forum", having considered precisely the same factors which he did consider in this case. The ingredients would have been the same and the result would have been the same. To hold that the court committed error because it spoke of the "balance of convenience" instead of the "unreasonableness of enforcement" is to enhance phraseology over substance and to place an unwarranted premium on a particular choice of words.

Consideration of which party has the burden of proof has limited significance in this case, because the district court found the balance "strongly" in favor of litigation in Tampa. As we analyze it, the burden of proof would be important if the court considered the other factors equally divided and that something was needed to tip the scales.

In short, if it be held that Unterweser did not waive any right it may have had to enforcement of the forum clause by (1) conducting discovery on the merits in the first suit, and (2) suing for limitation of liability, enforcement should be denied because it would be unreasonable. The courts below considered the factors which bear on reasonableness. They are the same factors that bear on convenience. The district court felt the factors prepon-

derated strongly in favor of retention. In this context, the issue does not turn on a decision as to which party had the burden of proof.

Rebuttal

In this section Zapata proposes to do no more than state the counterpoints to subsidiary points Unterweser has urged.

The Szukhent Case

As its first reason for granting the writ, Unterweser said the decision of the court of appeals *irreconcilably* conflicts with this Court's decision in *National Equipment Rental, Ltd.* v. *Szukhent,* 375 U.S. 311 (1964). See Pet. for Writ of Cert., p. 13. In that case Mr. Justice Stewart noted:

> "The only question now before us is whether the person upon whom the summons and complaint were served was 'an agent authorized by appointment' to receive the same . . ."[54]

and went on to hold: ". . . we have concluded that Florence Weinberg was 'an agent authorized by appointment . . . to receive service of process', and accordingly we reverse the judgment before us."[55] In discussing the decision Justice Stewart said: ". . . it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . ." But the principle mentioned in that decision is not involved, much less disputed, by Zapata or denied by the court of appeals in this case. Judge Wisdom recognized the irrelevance of *Szukhent* when he said (A. 260):

> "Szukhent is not significant authority, however, because the Court was faced with the question whether New York courts had jurisdiction, *not whether other courts should decline jurisdiction.*" (emphasis added)

[54] 375 U.S. at 313.
[55] ibid. 314

Comity

Unterweser says that under the circumstances of this case, United States public policy dictates that its courts give effect to the principle of comity.

This Court has expressed itself on such questions in unambiguous terms, where, *in a case like this, the contract was to be performed in part in the United States.* In *The Kensington,* 183 U.S. 263 (1902), the shipowner sought to enforce provisions exonerating it from liability for its own negligence. Such provisions were valid under Belgian law for which the contract stipulated. This Court *refused* enforcement on grounds of public policy, holding neither *comity* nor the will of the parties can set at naught the public policy of the United States. As the Court summed it up (at 269):

> "The contention amounts to this: where a contract is made in a foreign country, *to be executed at least in part in the United States,* the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it. It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine *that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught."*[56] (emphasis added)

Surely "comity" does not require the district court to stay Unterweser's limitation action so as to send Zapata to a forum where it cannot recover for Unterweser's negligence.

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[56] In accord: *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 F.2d 724 (2nd Cir. 1925), relying on *The Kensington,* supra.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit should be affirmed. Unterweser should be required to refrain from prosecuting the suit which it commenced in London until its limitation of liability action in the United States has been determined.

Respectfully submitted,

James K. Nance

JAMES K. NANCE

and

DEWEY R. VILLAREAL, JR.

Attorneys for Respondent

Of Counsel:
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

and

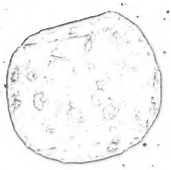
FOWLER, WHITE, GILLEN,
HUMKEY, KINNEY &
BOGGS, P.A.
P.O. Box 1438
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this Brief have been furnished by airmail postage prepaid to David C. Kerr and Jack C. Rinard of Macfarlane, Ferguson, Allison & Kelly, 512 Florida Avenue, P.O. Box 1531, Tampa, Florida 33601 and to Warren M. Faris and J. Y. Gilmore, Jr., of Faris, Ellis, Cutrone, Gilmore and Lautenschlaeger, 1207 Whitney Building, New Orleans, Louisiana 70130, Attorneys for Petitioner, this 20th day of January, 1972.

James K. Nance

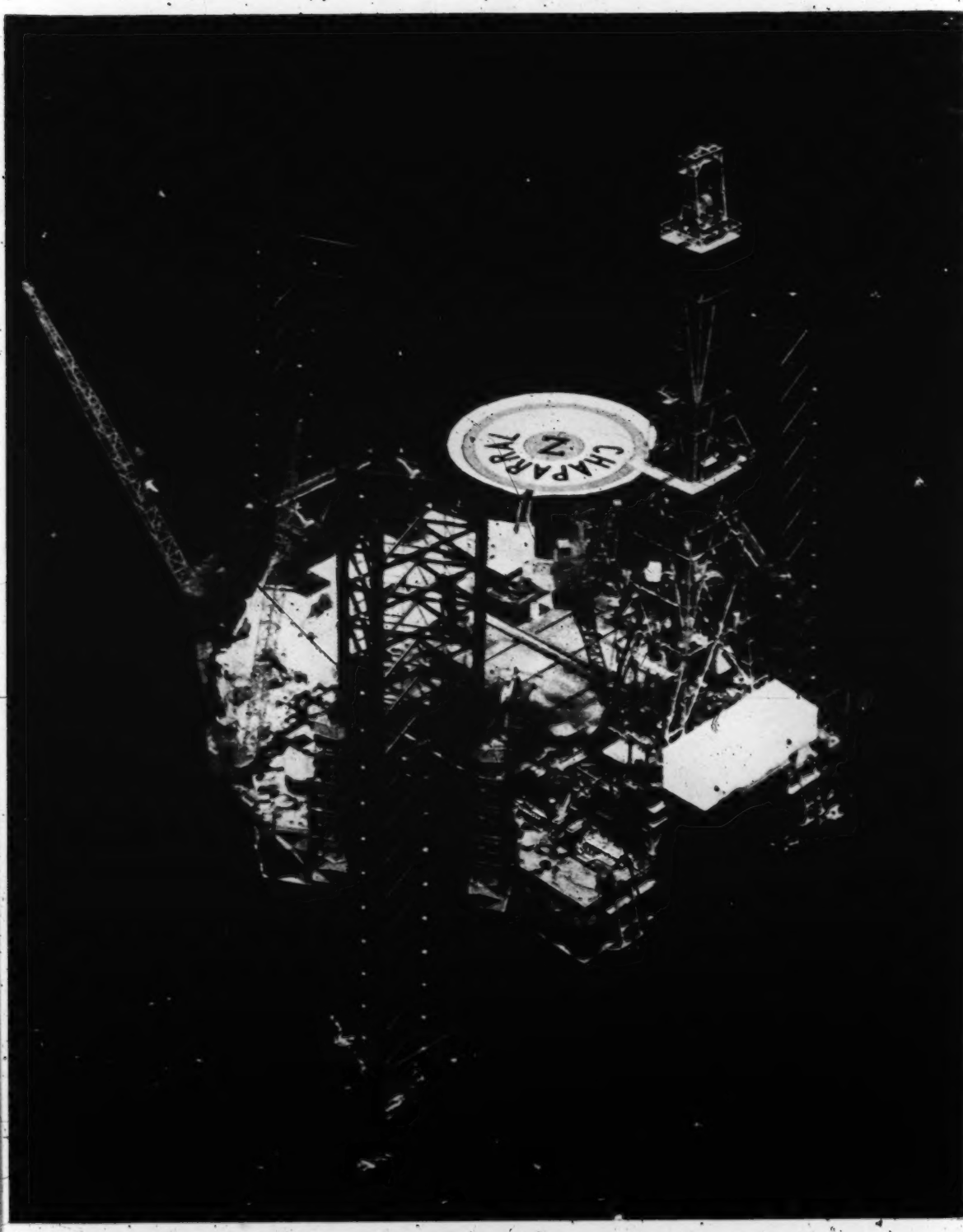
JAMES K. NANCE,
Attorney for Respondent



APPENDIX A

Leg locking devices, welded on deck of CHAPPARRAL. Anchored in Tampa Bay, January 13, 1968. (p. 263, Otto Litwinski deposition).

CHAPARRAL in its damaged condition in Tampa Bay, January 13, 1968.
(p. 176, Otto Litwinski deposition).



Prior to casualty — CHAPARRAL in drilling position, legs lowered. (p. 261, Otto Litwinski deposition).